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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Appellant and Cross-Appellee

v.

JOHN HUDSPETH, ET AL.,

Appellees and Cross-Appellants

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

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OPINION BELOW

The district court's judgment and findings of fact and conclusions of law appear at pages 12 through 15 of the reproduced record. Its "Supplemental Conclusion," filed after the record was docketed, is reproduced at R. 30.



## JURISDICTION

Judgment was entered by the district court on November 15, 1965, dismissing the trespass action brought by the United States against the defendants (R. 14).<sup>1/</sup> On November 24, 1965, the United States made a motion for new trial and amendment of findings of fact, conclusions of law and judgment (R. 16), which was denied on December 6, 1965 (R. 18). The district court had jurisdiction under 28 U.S.C. sec. 1345. From the judgment, the United States filed its notice of appeal on January 12, 1966 (R. 19), and the defendants filed a notice of appeal on January 17, 1966 (R. 20). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

## QUESTIONS PRESENTED

"Dependent" resurveys of certain lands were made by the Department of the Interior to relocate an original survey made in 1872. The questions presented are:

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<sup>1/</sup> In indicating record references, Volume I will be referred to as "R. ," while Volume II will be designated "Tr. ." The exhibits are found in a third supplemental record reproduced by the Court and will be cited as "Ex. ."



1. Whether a landowner claiming under the original survey has exhausted his administrative remedy to attack the resurvey.

2. Whether judicial review of such an administrative determination is limited to finding whether the administrative decision is supported by substantial evidence and is not arbitrary or capricious.

3. Whether, in any event, the district court erred as a matter of law by rejecting dependent resurveys made in accordance with proper legal standards.

4. Whether the district court's failure to specify the grounds upon which it refused to give effect to the resurvey is reversible error.

#### STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in Appendix B of this brief.

#### STATEMENT

The United States brought suit against the defendants for a series of timber trespasses alleged to have occurred over the period of September 1950 through October 1953, on public

domain lands in Township 11 South, Range 19 East, Willamette Meridian, Oregon (R. 1). The extent of the alleged trespasses amounted to \$27,377, and a judgment for double that amount was sought under Ore. R.S. sec. 105.815; 43 C.F.R. sec. 9239.0-8 (revised as of January 1, 1965) (R. 2, 7, 8; Tr. 80). In a pre-trial order, the areas cut, designated by section or quarter section, etc., were agreed to, as well as the unit value of the timber cut. It was also agreed that original surveys in the area were made in 1871, 1872 and 1881. It was further agreed that dependent resurveys were made in 1959 (approved 1960) and in 1962 (approved 1964) (R. 8). The issues posed by defendants' claim were in essence that the original surveys established the defendants' rights and that the resurveys did not follow the original surveys (R. 9). Aside from the resurvey issue, the only other question was value of timber cut from government lands (R. 9). This latter issue evaporated at the trial (Tr. 79-80).

The facts concerning survey and resurvey will be more fully developed in the Argument, infra. In short, they show that the defendants owned or had timber cutting rights



on lands patented from public lands adjacent to lands still federally owned. The original boundaries were officially set by John S. Kincaid in 1872 (Fdg. 3, R. 8, 13; Tr. 3, 4). Over the years these lines became increasingly difficult to determine. In 1958 and 1962, the Department of the Interior ordered dependent resurveys to reestablish the original lines of the original public lands survey (Ex. 7, 8; Tr. 11, 12). The instructions, in part, read (Ex. 7, pp. 1-2; Ex. 8, p. 2):

You will carefully retrace the lines authorized for resurvey, employing strict care in the matter of alignment and measurement, exercising due diligence with respect to any evidence of the original survey, making thorough and exhaustive search for the recovery of all original corners and satisfying yourself with reasonable certainty that no such evidence is overlooked.

The dependent resurveys were reviewed with approval by the Chief of the Branch of Cadastral Engineering, Bureau of Land Management, for the States of Oregon and Washington (Tr. 86-103). They were officially accepted (Fdg. 3, R. 8, 13). The original lines, as indicated by the dependent resurveys, brought to light the timber trespasses resulting in this suit.

At the trial, the United States proved through Exhibits 6-8 and through the testimony of Floyd A. Brooks (Tr. 10, 12, 27-28) and others (Tr. 89) that the dependent resurveys of the original Kincaid survey were conducted for the sole purpose of reconstructing and reestablishing the lines of the original survey as made by Kincaid in 1872. Brooks conducted the dependent resurveys of the boundaries in question (R. 10-12). He was a cadastral surveyor with the Bureau of Land Management and had had over 14 years of surveying experience (Tr. 9-10); he was a graduate of the Oregon State Institute of Technology where he took a program in survey technology (Tr. 9) and is a licensed surveyor in the State of Oregon (Tr. 10).

The dependent resurveys took Brooks, with a team of five men, over five months to complete (R. 8; Tr. 38). In his own words, conducting a dependent resurvey amounts to "a reconstruction of the original survey on the ground to reestablish or remonument the original corner positions" (Tr. 10). A summary of this step-by-step process, as presented at the trial, can be found in Appendix A of this brief.



The defendants admitted that they may have been trespassers on some of the land involved (Tr. 159-160). In presenting their case, no attempt was made to prove where the original lines exist or that they exist in any place other than where the dependent resurveys place them (Tr. 104-158). Instead, the defendants confined their case to criticism of the government resurveys, with some criticism of the original survey as being incomplete. They attempted to show that the original corners, as found by Brooks, might not be original corners (Tr. 107, 119): the area was rocky and the basalt stones uncovered by Brooks could be plain stones and not monuments (Tr. 134).

The Hudspeths' key witness, Gail Thomas, lacked any experience in handling resurveys (Tr. 140) and never attempted to resurvey the land in question (Tr. 138):

Q. (Mr. Borgeson): In other words, you haven't attempted to resurvey any portion of the township yourself, have you?

A. (Gail Thomas): I have not.

Q. You haven't attempted to take Mr. Kincaid's notes and follow them on the ground?

A. No.

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The Hudspeths' logging superintendant testified that to establish their timber cutting area they took the west boundary of the township, as surveyed by Thompson, and projected therefrom the lines indicated by Kincaid's original field notes (Tr. 145-148). Indications of the boundaries on the ground were never found (Tr. 148). Evidence as to where these projected lines fell upon the ground was never presented to the court.

The district court, in disagreement with the defendants' evidence, found that the defendants were in fact trespassers according to the original Kincaid survey (Fdg. 3; R. 13). However, the court went on to state that the United States brought this action based upon dependent resurveys and the defendants are not bound by them (Fdg. 3; R. 13). The court did not state that the dependent resurveys were not conducted in accordance with proper legal standards or were erroneous. The action was dismissed "without prejudice" to the right of the plaintiff to institute an action based on the Kincaid survey (Judgment, R. 14; Concl. of Law, R. 13). After the appeal was docketed, the court added a conclusion of law as follows (R. 30):

My theory in holding the plaintiff to the Kincaid survey is premised on authorities such as Cragin v. Powell, 128 U.S. 691 (1888), holding that after the sovereign has sold and disposed of lands pursuant to a certain survey, the courts have power to protect the private rights of the party who has purchased in good faith from the Government against the interferences or appropriations of corrective resurveys made subsequent to disposition or sale. Here, the resurveys on which the plaintiff depends were made subsequent to the alleged trespasses.

### SUMMARY OF ARGUMENT

1. Exhaustion of available administrative remedies is required before judicial consideration will be given. Failure to exhaust administrative remedies is especially fatal in highly specialized and technical matters. This is certainly the case with dependent resurveys which draw upon an understanding of geography, surveying, mathematics and engineering. The validity of dependent resurveys conducted by the Department of the Interior to reestablish original boundaries must be appealed directly to the Director of the Bureau of Land Management and the Secretary of the Interior before resort to the courts. Here, premature judicial consideration and prejudicial error resulted from the Hudspeths' failure to pursue administrative appeals and instead collaterally attacking the



dependent resurveys conducted in 1959 and 1962, to reestablish boundaries originally set in 1872, in the district court in 1964.

2. Even when courts consider such matters, the judicial function is narrowly limited. The courts will only determine whether the administrative determination is arbitrary or capricious. In this way the congressional delegation of power to the Secretary of the Interior is honored and the end product is greater uniformity. The district court should not have viewed the matter any broader merely because the required administrative appeals were not taken.

3. The legal standards for conducting dependent resurveys under federal and Oregon law are set forth in the Manual of Surveying Instructions (Dept. of the Interior, 1947). When so properly conducted, earlier vested rights in land are not altered or changed but simply are reestablished. The test of a valid dependent resurvey is whether it was properly conducted and is not a de novo comparison with field notes or



plats. Only the dependent resurvey evaluates, coordinates and reconstructs the existing indications of the original survey in order to arrive at the reestablishment of the original boundaries on the ground. Thus, where resurveys are made in accordance with the Manual, they are conclusive as having retraced the original boundaries on the ground. Refusal of the district court to treat them as original boundaries is error as a matter of law.

4. A district court sitting without a jury is required by Rule 52(a), F.R.Civ.P., to state the basis for its conclusions and judgment. Failure to do so is reversible error, as in this case, because there is no way to determine whether the court's action was founded upon correct legal premises. The memorandum filed after the appeal was docketed indicates it was not.

## ARGUMENT

### I

#### ADMINISTRATIVE REMEDIES WERE NOT EXHAUSTED

It is a well-established principle of law that no one is entitled to judicial relief until his prescribed administrative remedies have been exhausted. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938); Davis v. Nelson, 329 F.2d 840, 847 (C.A. 9, 1964); Coy v. Folsom, 228 F.2d 276, 280 (C.A. 3, 1955); Union Oil Co. of California v. Federal Power Commission, 236 F.2d 816, 818-819 (C.A. 5, 1956), cert. den., 352 U.S. 969 (1957).

Here, the Hudspeths failed to exhaust their administrative remedies. Had they believed that their rights were adversely affected by the 1959 and 1962 dependent resurveys of the original Kincaid survey, they could have appealed directly to the Bureau of Land Management and then to the Secretary of the Interior. 43 C.F.R. secs. 1842, 1844 (revised as of January 1, 1966) (App. B, infra, pp. 49-50). They did not do this. Instead, they waited until the United States brought a trespass action in August 1964, and then collaterally attacked the validity of the official dependent resurveys. A collateral attack, by its very nature, is in

itself forbidden. Gardner v. Bonestell, 180 U.S. 362, 369 (1901); Knight v. United States Land Association, 142 U.S. 161, 176 (1891); Cragin v. Powell, 128 U.S. 691, 699 (1899); Hallaian v. Collins, 242 P.2d 58, 59 (Cal.App. 1952); see generally Memorandum of the United States as amicus curiae <sup>2/</sup> in Placid Oil Co. v. Union Producing Co. (O.T. 1966, No. 85).

The administrative decision carries great weight in cases of this nature and administrative processes must not be circumvented because the making of dependent resurveys calls for a specialized understanding and technical knowledge of geography, surveying, mathematics and engineering. It takes someone with this expertise (a cadastral surveyor) to evaluate, coordinate and reconstruct the existing indications of the original survey in order to arrive at the reestablishment of the original boundaries on the ground. Ample supervision is provided: "The official resurveys are undertaken only when duly authorized, and the field work assigned to a cadastral engineer, who in that manner is acting under the

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<sup>2/</sup> Copies of this Memorandum for the United States filed in the United States Supreme Court on a pending case at the request of the Court, 384 U.S. 937, have been filed with the clerk and served upon opposing counsel. It states the position of the United States concerning surveying questions.



authority of the Secretary of the Interior through the Bureau of Land Management and under the immediate direction of subordinate supervising officers." Manual of Surveying Instructions (Dept. of the Interior, 1947) sec. 390, p. 311.

As spelled out in the Placid Oil memorandum, supra, this entire subject of surveys of lands located in the United States outside the original colonies has been, since 1796, a matter entrusted originally to the Surveyor General, now to the Bureau of Land Management. It is so exclusively a matter in the expertise of that office that the results are, generally speaking, not subject to any review by the court. See Placid memorandum, p. 7. Resurveys are just as much within the scope of that expertise as are original surveys (Id; pp. 5-6), limited only by the fact that vested rights cannot thereby be altered. The regulations recognize the obvious fact that resurveys are simply one aspect of the entire surveying picture and are properly within the competence of the federal surveying agency. Thus, as stated in 43 U.S.C. sec. 2:



The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, \* \* \*.

"The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for."

43 U.S.C. sec. 1201. "The official resurveys are undertaken only when duly authorized, and the field work assigned to a cadastral engineer, who in that manner is acting under the authority of the Secretary of the Interior through the Bureau of Land Management and under the immediate direction of subordinate supervising officers." Manual, sec. 390, p. 311.

The resurveys are "to be regarded as an official demonstration, on the part of the Bureau of Land Management, in the light of the best evidence available, by means of the legal subdivisions of a dependent resurvey or by the tract segregations of an independent resurvey, of the original position of entered or patented legal subdivisions or lots included in the original description when related to the original survey."

Manual, sec. 402, p. 317.

Thus, exhaustion of administrative remedies by appeal to the Director of the Bureau of Land Management and to the Secretary of the Interior from resurveys, as existed in this case, rather than collateral attack in a district court, was the required remedy. Then, if still aggrieved, the defendants could have resorted to the courts. Foster v. Seaton, 271 F.2d 836, 837 (C.A. D.C. 1959).

## II

### THE ADMINISTRATIVE DECISION IS NOT SHOWN TO HAVE BEEN ARBITRARY OR CAPRICIOUS

The limited function of the courts in reviewing determinations of the Secretary of the Interior is clearly recognized. The courts determine whether the administrative action is arbitrary or capricious. Cameron v. United States, 252 U.S. 450, 459-461, 464 (1920); Boesche v. Udall, 373 U.S. 472, 476-477 (1963); Best v. Humboldt Mining Co., 371 U.S. 334, 335-336 (1963); Standard Oil Co. of California v. United States, 107 F.2d 402, 410 (C.A. 9, 1940), cert. den., 309 U.S. 654; Morgan v. Udall, 306 F.2d 799, 801 (C.A. D.C. 1962), cert. den., 371 U.S. 941; Safarik v. Udall, 304 F.2d 944, 950 (C.A. D.C. 1962), cert. den., 371 U.S. 901; Asenap v. Huff, 312 F.2d 358, 359 (C.A. D.C. 1962). Certainly no broader



review is permitted in a collateral attack of the Department's decisions where the defendants failed to exhaust their administrative remedies than would be permitted in direct proceedings following a final administrative determination by the Secretary of the Interior.

"[G]reat confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done, and divisions more equitably made, than the department of public lands could do." Haydel v. Dufresne, 58 U.S. (17 How.) 22, 30 (1854). The courts must guard against destruction of "the unified administration attained by the creation of a single agency and to make of the eleven courts of appeals eleven super agencies." National Labor Relations Bd. v. Southland Mfg. Co., 201 F.2d 244, 246 (C.A. 4, 1952).

In reversing the lower courts' decisions in Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940), a case involving great technical expertise, the Supreme Court stated (pp. 581-583): "Both the District Court

and the Circuit Court of Appeals appear to have been dominated by their own conception of the fairness and reasonableness of the challenged order \* \* \*. These touch matters of geography and geology and physics and engineering \* \* \*. Plainly these are not issues for our arbitrament." A similar situation existed here in the district court.

If anything, the district court should have addressed itself to the problem of whether the dependent resurveys were supported by substantial evidence and were not arbitrary and capricious, i.e., whether they were conducted in accordance with the standards required by law. There has been a complete failure of the district court to so view the problem.

There is nothing in the record to indicate that the resurveys were arbitrary or capricious. The district court made no such finding. As indicated in Appendix A, the resurveys were carefully and thoroughly conducted in accordance with proper legal standards. This is not matter which can be shown by mathematical certainty. Appellees nowhere showed that the result was not a reasonable one on the facts. It should, therefore, have been respected by the court.



### III

DEPENDENT RESURVEYS MUST BE ACCEPTED  
AS HAVING REESTABLISHED THE ORIGINAL  
BOUNDARIES WHEN CONDUCTED IN ACCORDANCE  
WITH THE MANUAL OF SURVEYING INSTRUCTIONS

A. Under federal and Oregon law, the Manual sets

forth the standards and procedures for conducting surveys. -

The Manual of Surveying Instructions (United States Department of the Interior, 1947), as the introduction points out (p. III), "is issued for the guidance of all employees who exercise a technical responsibility in the execution of cadastral surveys or resurveys \* \* \* [and] will supersede all previous instructions or regulations \* \* \*." Thus, the Manual is the standard by which the Federal Government determines the validity of surveying techniques.

This standard has also been adopted by the western states. The laws of the State of Oregon, for instance, charge the county surveyors to make surveys of legal subdivisions "in accordance with the laws and regulations of the General Land Office (Bureau of Land Management) of the United States." Ore. R.S. sec. 209.070(6). Oregon law also provides that, where title to land is in dispute, the court can order the

county surveyor to conduct a survey or resurvey of the disputed land. Ore. R.S. sec. 209.020. Such survey by the county surveyor would have to be made pursuant to law, and, therefore, in accordance with the Manual.

In Cramer v. Driesbach, 287 P.2d 981 (Idaho 1955), the plaintiff's cadastral survey was conducted in accordance with the Manual and was the only comprehensive and accurate survey. The Supreme Court of Idaho held (p. 985): "In such a state of the record, the trial court was bound to accept the lines as [so] located." In that case, the defendant's evidence which the trial court accepted was rejected by the appellate court because it was incomplete and did not comply with the Manual.

B. The defendants were negligent in not following the appropriate methods for determining boundaries. - It is the duty of the person causing timber to be cut to determine the location of his boundary line in advance of the cutting. Gordon Creek Tree Farms, Inc. v. Layne, 368 P.2d 737, 741 (Ore. 1962); Longview Fibre Co. v. Johnson, 238 P.2d 722, 728-729 (Ore. 1951); United States v. Firchau, 380 P.2d 800



(Ore. 1963); United States v. Hult, 319 F.2d 47 (C.A. 9, 1963). Trespassers cut beyond their boundaries at their peril. This policy is necessary because of the policing difficulties encountered by government agencies in administering and protecting the vast timber lands of the United States and the state governmental agencies.

Here the method used by the defendants to determine the area in which they could cut timber was haphazard and was not in accordance with the Manual. The defendants took the corners of the west boundary of the township, as surveyed by Thompson, and projected lines easterly by record bearings and distances of Kincaid (Tr. 145-148). The west boundary of the township is the only side not originally surveyed by Kincaid (Tr. 19, 145). If there is one township boundary least likely to coordinate well with the subdivisional lines, it is the west boundary. Moreover, this procedure completely ignores the Kincaid interior monuments and the exterior township boundary monuments. No indications of the original boundaries were uncovered on the ground using this method (Tr. 148). This is a good indication of how incorrect the defendants' procedure was. It was also completely inconsistent with the procedure as set forth in the Manual, sec. 348, p. 282 - sec. 427, p. 327.



Furthermore, the record does not reveal any attempt by the defendants to comply with 43 C.F.R. sec. 9185 to request the Federal Government to resurvey the boundaries. All the record reveals is a vague one-sentence assertion by the defendants' logging superintendent that the Bureau of Land Management was called (Tr. 145).

The fact that the defendants acted in good faith and attempted to establish some sort of boundaries does not exonerate them. This is immaterial because they cut timber and were under a duty to correctly locate the property boundaries and are liable as trespassers for failure to do so. Gordon Creek Tree Farms, Inc. v. Layne, 368 P.2d 737 (Ore. 1962) and cases supra, pp. 20-21. Their good faith only bears on the measure of damages and not upon liability.

C. The dependent resurveys properly reestablished the lines of the original survey on the ground, since they were conducted in accordance with the Manual. - A dependent resurvey is defined in the Manual (sec. 400, p. 315) as:

\* \* \* a restoration of what purports to be the original conditions according to the record, based, first, upon identified existing corners of the original survey and other recognized and acceptable points of control, and, second, upon the restoration of missing corners by proportionate measurement in harmony with the record of

Its object is two fold (Manual, sec. 387, p. 309):

First, the adequate protection of existing rights acquired under the original survey in the matter of their location on the earth's surface, and, second, the proper marking of the boundaries of the remaining public lands.

When the district court found that the defendants were not bound by the dependent resurveys, but suit could still be brought on the "Kincaid survey", it illustrated its misunderstanding of the very nature of a dependent resurvey (Fdgs. & Concl., R. 13). This misunderstanding was further amplified by (1) the finding that the defendants did in fact trespass on the public lands of the United States on the basis of the Kincaid survey and (2) the court's act of dismissing the Government's case because it was based upon dependent resurveys of the Kincaid survey and not the original survey itself. (Fdgs. 3, R. 13).<sup>3/</sup>

The simple fact is that this suit was instituted "based on the Kincaid survey" (R. 9). A dependent resurvey cannot be contrasted with the original survey it is attempting

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<sup>3/</sup> The basis for the court's conclusion to reject the dependent resurveys was not revealed. For discussion of the inadequacy of the district court's findings see pp. 28-32 of this brief.

to reestablish. The two are indistinguishable because the dependent resurvey is the original survey on the ground. Only the dependent resurvey takes the plats and field notes of the original survey and coordinates them with existing evidence on the ground. It replaces on the ground as near as it can the survey made 90 years earlier.

By its very nature, a dependent resurvey is caused by the fact that there are gaps to be filled in, but rather than fill them in as though the entire survey was performed correctly, they are filled in as they previously existed under the original survey. When bona fide rights of private parties are involved, the cadastral surveyor pieces together the best available evidence to arrive at "the original position of entered or patented legal subdivisions or lots included in the original description when related to the original survey." Manual, sec. 402, p. 317; see Ayers v. Watson, 137 U.S. 584, 600-601, 604 (1891); Galt v. Willingham, 11 F.2d 757, 758 (C.A. 5, 1926); Vaught v. McClymond, 155 P.2d 612, 616 (Mont. 1945); Trustees of the Internal Improvement Fund of the State of Florida v. Toffel, 145 So.2d 737, 741-742



(Fla. 1962); J. M. Beard, 52 L.D. 451, 453 (1928); B.L.M. decision, Lawrence H. Newton, No. 47-80036, 5.04g (1960); B.L.M. decision, H. M. Meloney, No. 47-72797, 5.04g (1958).

As pointed out in Lawrence H. Newton:

\* \* \* the objective of the resurvey is the restoration of the corners in their true position from the best available evidence of the original survey. That may consist of physical evidence of the corner or its accessories; collateral evidence such as supplemental survey records, evidence of improvements related to the lines and corners of the survey, testimony of settlers having knowledge of conditions respecting the corners, etc. Reestablishment of a corner by proportionate measurement is a last resort and is employed where there is no other reasonable basis for determining the position of the corner  
\* \* \*.

The decision further pointed out that the party claiming before the Department that the dependent resurvey was invalid must make a showing:

\* \* \* based not on conjecture, but upon a demonstration that there is some identifiable point of land more likely to have been the site of the original corner than the particular site chosen by the cadastral engineer. \* \* \*

Since the procedure prescribed by the Manual for reestablishing a corner was followed, and since the appellant has made no showing

that the corner established thereby is not correct, the decision of the Area Administrator, dismissing the protest, is affirmed.

Thus, a dependent resurvey performed in accordance with the Manual does not affect or change prior existing rights in the land. It establishes what those rights have always been. This stands in sharp contrast to a new or corrective survey which ignores the earlier original survey and, as with all surveys, cannot change prior existing interests in the land. United States v. State Investment Co., 264 U.S. 206, 212 (1924) Cragin v. Powell, 128 U.S. 691, 699-700 (1888). The defendants have argued that their rights were interfered with, yet they never showed the court what those rights were. They did not present any evidence as to where, on the ground, the boundaries exist other than where the dependent resurveys place them.

Then, the critical issue in determining the validity of a particular dependent resurvey is: whether the dependent resurvey was conducted in accordance with those standards established by law, that is, the Manual. How else could one test the accuracy of a dependent resurvey but to see whether it was performed in accordance with acceptable legal standards?



There is nothing else on the ground with which to compare it. The district court ignored this standard and merely presented its conclusion that the defendants should not be bound by the dependent resurveys (Fdg. 3; R. 13).

This discussion as to the very nature of a dependent resurvey should not be cast aside as a factual matter for which a finding must be clearly erroneous to be overturned. We are concerned with the legal standard to be applied when the validity of a dependent resurvey is at issue. United States v. General Motors Corporation, 384 U.S. 127, 141 fn. 16 (1966), pointed out that the ultimate conclusions of a trial judge are not to be shielded by the "clearly erroneous" test of Rule 52(a), F.R.Civ.P. "[T]he question here is not one of 'fact,' but consists rather of the legal standard required to be applied to the undisputed facts of the case." The court went on to state: "\* \* \* the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52(a) \* \* \* plays only a restricted role here. This was essentially a 'paper case.'"



In short, the fact is perfectly clear that, had this record been made in departmental proceedings, the dependent resurveys would have been approved. The result should be no different when a court undertakes to decide the matter.

#### IV

#### THE SPECIFIC BASIS FOR THE RESULT OF A JUDGE-TRIED CASE MUST APPEAR

Rule 52(a) of the Federal Rules of Civil Procedure requires that a district court in a non-jury case "find the facts specially." The Supreme Court has construed that provision to mean that the district court must make findings, "in such detail and exactness as the nature of the case permits, of subsidiary facts on which the ultimate conclusion \* \* \* can rationally be predicted." Kelly v. Everglades Drainage District, 319 U.S. 415, 420 (1943); see Commissioner v. Duberstein, 363 U.S. 278, 292 (1960); Hatahley v. United States, 351 U.S. 173, 182 (1956); Dalehite v. United States, 346 U.S. 15, 24 fn. 8 (1953). The underlying policy for requiring triers of fact to state sufficiently detailed findings is to provide a basis for review.

As early as 1870, the Supreme Court stated in Miller v. Life Insurance Co., 79 U.S. (12 Wall.) 285, 301, that the review of special findings extends to the determination of the question "whether the facts found are sufficient to support the judgment" and "it is well settled law that the finding must be sufficient in itself without inferences or comparisons, or balancing of testimony or weighing evidence."

The district court, by rejecting the dependent resurveys without stating the basis for its decision, precluded any possible review on the merits.<sup>4/</sup> Its result is little more than would be a jury verdict. The district court did not find either that:

- (1) Kincaid never originally laid boundaries or interior corners; <sup>5/</sup> or

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<sup>4/</sup> The conclusory findings the court did make are in themselves contradictory (Fdg. & Concl. 3, R. 13). It said the Hudspeths trespassed according to the Kincaid survey; that the dependent resurvey of the Kincaid survey is not applicable; but that the United States could bring an action based upon the Kincaid survey. The court makes no finding that the resurveys were not properly done. To the contrary, the facts indicate that the Manual's requirements were met.

<sup>5/</sup> Just the opposite is indicated by the court's finding that the Hudspeths did, in fact, commit trespasses according to the Kincaid survey (Fdg. 3; R. 13).



- (2) the United States did not follow prescribed rules and regulations in running the dependent resurveys of the Kincaid survey; or
- (3) the United States failed to evaluate or incorrectly evaluated evidence going into the dependent resurveys; or
- (4) the original survey can be placed on the ground any more accurately than the United States has done.

Making no specific findings as to inadequacies, the court in no way indicates what could be cured by a new suit.

This failure to make specific findings renders the dismissal without prejudice deceptive. The court did not dismiss the complaint on the basis of errors in the conduct of the dependent resurveys for which the Department of the Interior could have done a better job. The court apparently accepted the Government's position that the dependent resurveys were accurately performed in accordance with legal standards. It simply refused to apply them to the defendants. Not until the district court filed a supplemental conclusion after the record was docketed (R. 30) was any indication given as to why it rejected the dependent resurveys of the Kincaid survey. The crux of its decision appears in the assertion: "Here, the



resurveys \* \* \* were made subsequent to the alleged trespasses." <sup>6/</sup> This is an anomalous and rather paralyzing result--how else could the original survey performed in 1872 be reestablished on the ground today and the fact of trespass shown? The very reason for the dependent resurvey was to establish the Kincaid survey on the ground. A dependent resurvey, properly conducted in accordance with the Manual, is the best evidence of the original survey on the ground and stands in place of the original survey. Although the court suggested that the Government might bring a new trespass action based upon the Kincaid survey, that would be nugatory. The effect of the court's decision is to condone the trespass of the defendants on the public domain

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6/ The district court cited Cragin v. Powell, 128 U.S. 691 (1888), for upholding this conclusion. However, Cragin simply holds that where parties have definite rights in land, those rights cannot be altered or changed by later surveys. Here the dependent resurveys do not alter any pre-existing rights in the land--the defendants presented no evidence that their vested interests were anywhere other than where the resurveys placed them. The resurveys simply reestablished what those rights have always been under the original Kincaid survey. This case is brought on the basis of the Kincaid survey. That survey determined the boundary lines. The object of the resurvey is to furnish proof of the location of lost lines or monuments, and not to dispute the correctness of or to change the original survey.

because the Government has no way of proving its boundaries at the time of trespass other than by dependent resurveys. To permit such a result to stand reverses the obligations of the parties. The very point of the timber trespass laws, particularly the double and triple damages provisions, supra, pp. 20-22 is to impose on the lumberman the duty not to trespass on government property. The district court would reverse this and impose upon the Government the duty to vigilantly watch all of its properties and resurvey them when necessary to catch future trespassers, allowing those occurring before the resurvey to go uncompensated.

#### CONCLUSION

For the foregoing reasons, it is submitted that the judgment below should be reversed and the case remanded to the district court with detailed instructions in accordance with the law.

Respectfully submitted,

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## APPENDIX A

### Determination of Floyd A. Brooks

The following highlights from the direct examination of Brooks can only be properly understood when read in conjunction with the instructions and dependent resurveys themselves (Ex. 7, 7A, 8 and 8A) which were offered and received into evidence (Tr. 11).

Floyd A. Brooks was a cadastral surveyor with the Bureau of Land Management, Department of the Interior (Tr. 9). He was graduated from Oregon State Institute of Technology, where he took a two-year program in survey technology (Tr. 9). He is a licensed surveyor in Oregon and has had over 14 years' surveying experience (Tr. 10). He conducted the resurveys of portions of Township 11 South, Range 19 East, according to instructions from the Bureau of Land Management (Tr. 10-12; Ex. 7, 8). In essence, this amounts to "a reconstruction of the original survey on the ground to re-establish or remonument the original corner positions" (Tr. 12). As to the procedure followed in conducting the dependent resurveys, Brooks pointed out (Tr. 28): "The original corners as located [are] the major control[s] in all cases. \* \* \* [I]n the process of looking for



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these original monuments, we would take into consideration any calls of topography. Now, these calls of topography cannot be used to re-establish a corner, but they can be used to verify corner position. And if unable to find an original corner from any of this type of information, then we would look for local or County surveyor corners; 'local' meaning corners established by a private surveyor and recorded."

The retracement of the lines of the original survey was commenced at the corner of Sections 25, 30, 31, and 36, on the west boundary of Township 11 South, Range 19 East (Tr. 13). Brooks surveyed a random line East, a distance of one mile, between Sections 30 and 31 (Tr. 13). He found neither the quarter-section corner or the corner of Sections 29, 30, 31, and 32 as established by Kincaid (Tr. 13). He turned South, on a random line between Sections 31 and 32 (Tr. 13). Again, he found no corners on this mile (Tr. 13). He then retraced West one mile, on the south boundary of Section 31, failing to find the quarter-section corner but recovering the southwest corner of Section 36, which is also the southwest corner of the township (Tr. 13). Next, Brooks returned

to his temporary southeast corner of Section 31, from which he retraced East on the south boundary of the township along the south boundary of Sections 32 and 33 (Tr. 14). He found no corners until he had gone two miles, where he located a basalt stone, 14 by 8 by 6 inches, loosely set four inches in the ground at a fence corner from which fences extended North, South, and East; the stone had three grooves chiseled on the west face (Tr. 14; Ex. 7A, p. 1). At a distance of 23 links, S.  $51\frac{1}{4}^{\circ}$  E. from the marked stone, Brooks found a juniper tree, 15 inches in diameter, with the marks "T12S R9 S3" scribed on a partly healed blaze; he had no record of any witness tree for this corner (Tr. 15; Ex. 7A, p. 1).

From his temporary point for the corner of Sections 4, 5, 32, and 33, on the south boundary of the township, a mile West of the marked stone, Brooks retraced North between Sections 32 and 33, but found no corners on this mile of line (Tr. 15). He turned West for one mile between Sections 29 and 32 to connect up with his temporary corner of Sections 29, 30, 31, and 32, still failing to find corners (Tr. 15). Returning to his temporary corner of Sections 28, 29, 32, and 33,

he retraced East between Sections 28 and 33, but again found no corners (Tr. 15). He therefore continued to retrace East between Sections 27 and 34, to the corner of Sections 26, 27, 34, and 35 (Tr. 15). Here he found a basalt stone, 24 by 16 by 6 inches, lying on its side in a small mound of stone, at the corner of barbed wire fences extending North and West; the stone had one groove chiseled on the south face (Tr. 15; Ex. 7A, p. 20). The size of this stone agrees with Kincaid's record (Ex. 6A, p. 14).

This manner of retracing the lines of the original survey was in accordance with the Special Instructions for Survey Group No. 421, Oregon, dated October 7, 1958 (Ex. 7). These named the boundaries of public land to be resurveyed; they gave history of the previous surveys, and outlined the methods by which the surveyor was to proceed (Ex. 7, pp. 1 and 2). He was to be (Ex. 7, pp. 1, 2):

\* \* \* guided by the Manual of Surveying Instructions, 1947, the provisions of the following special instructions, and such supplemental instructions as may be issued pursuant to the report of complications developed during the progress of the work, or by reason of additional authorization.

\* \* \* \* \*



You will carefully retrace the lines authorized for resurvey, employing strict care in the matter of alignment and measurement, exercising due diligence with respect to any evidence of the original survey, making thorough and exhaustive search for the recovery of all original corners and satisfying yourself with reasonable certainty that no such evidence is overlooked and marking temporary points for those corners that are not found with sufficient permanence so that their subsequent recovery and conversion to permanent monuments can be accomplished with a minimum of cost and effort.

\* \* \* \* \*

You will extend your retracements to the boundary lines of adjacent sections in any cases where such action becomes necessary in the development of control for the restoration of any corner of the sections herein provided for dependent resurvey, in which cases you will rehabilitate the control corners by remonumentation, setting standard iron corner monuments in conformity with Manual procedure.

Any and all lost corners of the sections for resurvey will be restored by the appropriate method of proportionate measurements which are described in detail, along with other pertinent matter, in Secs. 348 to 408, inclusive, of the Manual.

It is immaterial at which corner your retracements are initiated, nor is the order in which they are made important; however, your field notes and any reports submitted will be so arranged that the results of the examination and resurvey will appear in the record in regular order.

Brooks continued his retracements in accordance with these instructions in order to establish control for the re-establishment of lost corners (Tr. 16). He had to go to the north, east, and west boundaries (Tr. 16). It was also necessary for him to retrace a part of the north boundary to obtain control for re-establishment of other lost corners (Tr. 17). He recovered the northeast corner of the township, which was monumented with a marked stone, witnessed by bearing trees (Tr. 17). He also recovered the corner of Sections 5, 6, 31, and 32 on the north boundary (Tr. 18). While resurveying the true north boundary, as controlled by these two recovered corners, he recovered the corner of Sections 4, 5, 32, and 33, which was monumented with a marked basalt stone (Tr. 18).

Brooks went on to tell of his meeting with the Kaser brothers who told him the general location of the southwest and southeast corners of Section 16 (Tr. 19). Using this information, he located the original corner monuments which were marked with basalt stones which matched the ones in the original record (Tr. 20-22). He described the mound of stones



at the southeast corner of Section 16 as "circular in shape and made up of several stones fairly large in diameter, a cross section, and it had settled into the earth--I suppose this would be due to frost action over the years--until it was nearly buried. And you had to remove stuff away from this to determine that there was a mound rather than just a hump in the ground" (Tr. 21). This corner is near a fence corner from which a fence, partly fallen down, extends along the south boundary of Section 16 (Tr. 23). The monument found at the southwest corner of Section 16 "is a basalt stone matching the size of [the one in] the record \* \* \*. This stone however was still upright in the mound rather than having been turned over on the side" (Tr. 21).

Brooks found the northeast corner of Section 16, monumented with a basalt stone, faintly marked or unmarked, and a mound of stone, located in a fence line extending North and South (Tr. 23). The northwest corner of Section 16 "had been taken out by logging operations" (Tr. 23, 24). Fences extended to the East and South; by sighting along these fence lines Brooks determined where the fence corner had been and so determined the position of the section corner (Tr. 23).



The corners of Section 16 gave Brooks the control for the restoration of corners in the interior of the township that he was unable to locate on the ground (Tr. 24). Brooks then explained what he meant by control (Tr. 24, 25):

"\* \* \* [The corner of Sections] 16, 17, 20 and 21 for example, which would in effect control the line between that particular corner and the corner on the South boundary three miles to the South of it, or it would be the corner of Sections [32] and [33] on the South boundary. It would control the North-South position of all the intermediate corners. It would not control the East-West position of any of those corners. They would be controlled from the corner on the West boundary and a corner on the East boundary and a corner on the East boundary for East-West position." In Section 365 of the Manual of Surveying Instructions (1947), which was made a part of Brooks' special instructions, (Ex. 7, p. 2), the following statement is made: "The double proportionate measurement is the best example of the principle that existent or known corners to the north and to the south should control any intermediate latitudinal position, and that corners east and west should control the position in longitude"; and Section 350 of the Manual of Surveying Instructions

(1947) describes an "existent" corner as "one whose position can be identified by verifying the evidence of the monument, or its accessories, by reference to the description that is contained in the field notes, or where the point can be located by an acceptable supplemental survey record, some physical evidence, or testimony." Thus, Brooks is describing a procedure that follows the instructions in the Manual.

The corners Brooks found in Section 16 tied in well with the original field notes. "On the North boundary of Section 16, on the line directions between 9 and 16, Mr. Kincaid indicated the crossing in the Cherry Creek crossing or Cherry Creek Gulch \* \* \*. This crossing fits in very well with the corners as located \* \* \*" (Tr. 25-26). The measurements were very nearly the same as those indicated by Kincaid's field notes (Tr. 26). Archie Hamilton, who was apparently employed by the Hudspeths, assisted Brooks in 1959 in locating two corners on the ground: the corner of Sections 13, 24, 18, and 19, on the east boundary of the township, and the corner of Sections 33, 34, 3, and 4, on the south boundary of the township (Tr. 29-30).

Brooks completed his survey "\* \* \* on the basis of my field notes, my notes that I kept actually in the field for distances between my temporary corners and the bearing between them, using these corners around 16 and any other corners that I had found, original corners, by calculation I computed the positions of all the corners that were missing and then made moves accordingly from my temporary points to these positions" (Tr. 27). Irving Zirpel, Jr., now Chief of the Branch of Cadastral Engineering, Bureau of Land Management, for the States of Oregon and Washington, reviewed and checked Brooks' work (Tr. 29, 87).



## APPENDIX B

### Statutes and Regulations

#### Rule 52(a), F.R.Civ.P.:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, \* \* \*.

#### 43 U.S.C. sec. 2:

The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

#### 43 U.S.C. sec. 751:

The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of an Indian reservation, or of tracts of land surveyed or patented prior to May 18, 1796, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require.

Second. The corners of the townships must be marked with progressive numbers from the beginning; each distance of a mile between such corners must be also distinctly marked with marks different from those of the corners.

Third. The township shall be subdivided into sections, containing, as nearly as may be, six hundred and forty acres each, by running parallel lines through the same from east to west and from south to north at the distance of one mile from each other, and marking corners at the distance of each half mile. The sections shall be numbered, respectively, beginning with the number one in the northeast section and proceeding west and east alternately through the township with progressive numbers, until the thirty-six be completed.

Fourth. The deputy surveyors, respectively, shall cause to be marked on a tree near each corner established in the manner described, and within the section, the number of such section, and over it the number of the township within which such section may be; and the deputy surveyors shall carefully note, in their respective field books, the names of the corner trees marked and the numbers so made.

Fifth. Where the exterior lines of the townships which may be subdivided into sections or half-sections exceed, or do not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western and northern ranges of sections or half-sections in such township, according as the error may be in running the lines from east to west, or from north to south; the sections and half-sections bounded on the northern and western lines of such townships shall be sold as containing only the quantity expressed in the returns and plats respectively, and all others as containing the complete legal quantity.



Sixth. All lines shall be plainly marked upon trees, and measured with chains, containing two perches of sixteen and one-half feet each, subdivided into twenty-five equal links; and the chain shall be adjusted to a standard to be kept for that purpose.

Seventh. Every surveyor shall note in his field book the true situations of all mines, salt licks, salt springs, and mill-seats which come to his knowledge; all watercourses over which the line he runs may pass; and also the quality of the lands.

Eighth. These field books shall be returned to the Secretary of the Interior or such officer as he may designate, who shall cause therefrom a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales. He shall also cause a fair plat to be made of the townships and fractional parts of townships contained in the lands, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose; and a copy thereof shall be kept open at the office of the Secretary of the Interior or of such agency as he may designate for public information, and other copies shall be sent to the places of the sale, and to the Bureau of Land Management.

43 U.S.C. sec. 752:

The boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands shall be ascertained in conformity with the following principles:



First. All the corners marked in the surveys, returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half- and quarter-sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.

Second. The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the watercourse, Indian boundary line, or other external boundary of such fractional township.

Third. Each section or subdivision of section, the contents whereof have been returned by the Secretary of the Interior or such agency as he may designate, shall be held and considered as containing the exact quantity expressed in such return; and the half sections and quarter

sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make part.

43 U.S.C. sec. 772:

The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement: Provided further, That not to exceed 20 per cent of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby.

43 U.S.C. sec. 773:

Upon the application of the owners of three-fourths of the privately owned lands in any township covered by public-land surveys, more than 50 per centum of the area of which townships is privately owned, accompanied by a deposit with the Secretary of the Interior, or such officer as he may designate, of the proportionate estimated cost, inclusive of the necessary work, of the resurvey or retracement of all the privately owned lands in said township, the Secretary, or



such officer as he may designate, shall be authorized in his discretion to cause to be made a resurvey or retracement of the lines of said township and to set permanent corners and monuments in accordance with the laws and regulations governing surveys and resurveys of public lands. The sum so deposited shall be held by the Secretary of the Interior or such officer as he may designate, and may be expended in payment of the cost of such survey, including field and office work, and any excess over the cost of such survey and the expenses incident thereto shall be repaid pro rata to the persons making said deposits or their legal representatives. The proportionate cost of the field and office work for the resurvey or retracement of any public lands in such township shall be paid from the current appropriation for the survey and resurvey of public lands, in addition to the portion of such appropriation otherwise allowed by law for resurveys and retracements. Similar resurveys and retracements may be made on the application, accompanied by the requisite deposit, of any court of competent jurisdiction, the returns of such resurvey or retracement to be submitted to the court. The Secretary of the Interior is authorized to make all necessary rules and regulations to carry this section into full force and effect.

43 U.S.C. sec. 1201:

The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.



43 C.F.R. sec. 1842.2:

Subpart 1842--Appeals to the Director of  
the Bureau of Land Management

§ 1842.2 Who may appeal.

Except as otherwise provided in Subpart 2411 of this chapter, any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management other than the Director or person signing for the Director, shall have a right of appeal to the Director.

43 C.F.R. sec. 1843.5:

Subpart 1843--Actions by Director

§1843.5 Request for hearings on appeals  
involving questions of fact.

Either an appellant or an adverse party may, if he desires a hearing to present evidence on an issue of fact, request that the case be assigned to a Field Commissioner of the Bureau of Land Management for such a hearing. Such a request must be made in writing and filed with the Director within 30 days after answer is due and a copy of the request should be served on the opposing party in the case. The allowance of a request for hearing is within the discretion of the Director, and the Director may, on his own motion, refer any case to a Field Commissioner for a hearing on an issue of fact. If a hearing is ordered, the Director will specify the issues upon which the hearing is to be held.

43 C.F.R. sec. 1844.1:

Subpart 1844-Appeals to Secretary of the Interior

§ 1844.1 Right of appeal to the Secretary of the Interior.

Any party adversely affected may appeal to the Secretary of the Interior from a final decision of the Director, whether such final decision is on an appeal or is an original decision, except from such a decision which, prior to promulgation, has been approved by the Secretary. No appeal, however, may be taken from a decision of the Director affirming a decision of a subordinate official of the Bureau in any case where the party adversely affected shall have failed to appeal from the decision of such official.

43 C.F.R. sec. 9180.0-2(b)

Subpart 9180--Cadastral Surveys; General

(b) Resurveys. The real interest of the Government in the resurvey of the public lands is well stated in the said act of March 3, 1909, "to properly mark the boundaries of the public lands remaining undisposed of." Its duty being thus defined, the Bureau of Land Management will refrain from attempting to do more in the relocation of the corners of privately owned lands in a township being resurveyed than to re-establish such corners from the best available evidence of the original survey.



43 C.F.R. sec. 9180.0-3(a)(1)(2):

§ 9180.0-3 Authority.

(a) Delegation to Director, Bureau of Land Management. (1) In the establishment of the Bureau of Land Management by Reorganization Plan No. 3 of 1946, the office of Supervisor of Surveys was abolished and the functions and powers thereof were transferred to the Secretary of the Interior, to be performed by such officers or agencies of the Department as might be designated by the Secretary. Under that authority, the functions and powers formerly exercised by the Supervisor of Surveys were delegated to the Chief Cadastral Engineer, subject to the supervision of the Director, Bureau of Land Management. In the general reorganization and realignment of functions of the Bureau, the office of Chief Cadastral Engineer has been abolished, and the functions of that office have been delegated to the Director.

(2) By this sequence, the cadastral surveying work of the Bureau of Land Management has been placed under the immediate jurisdiction of the Director, subject to the direction and control of the Secretary of the Interior. Certain functions relating to specific phases of the cadastral surveying work have been delegated to the State Director.

43 C.F.R. sec. 9185.3-9185.4-3:

§9185.3 Requirements for resurveys; without cost to applicant.

§9185.3-1 Eligibility.

(a) Determined by ownership of land. As a general rule, and in the absence of any particular governmental purpose to be subserved,



no township is eligible for resurvey unless title to at least 50 percent of the area of the lands embraced therein remains in the United States. For the purpose of determining the eligibility of a township under this rule, lands covered by approved selections, school sections, and entries upon which final certificates or patents have been issued are to be considered as alienated lands. Townships within the primary limits of railroad land grants are generally ineligible.

(b) Determined by physical character of remaining public land. In general no resurvey will be undertaken unless the preliminary examination of the township develops evidence of existing settlement and agricultural possibilities sufficient to support the presumption that the unappropriated lands therein are such as to attract bona fide entrymen, thus eliminating townships which, although theoretically eligible, are of such a physical character that the resurvey thereof would serve no useful purpose.

(c) Small areas. In the application of the terms of the act of March 3, 1909 (35 Stat. 845), as amended, is not intended that there shall be undertaken any work involving the mere reestablishment of lost or obliterated or misplaced corners in a limited area of a township, such work being within the province of the local surveyors, and the authority of the public survey office will be limited to the giving of advice in accordance with the circular for the restoration of lost or obliterated corners. Employees of the Bureau of Land Management are prohibited from participating in the resurvey of a township, the reestablishment of lost corners, or in the subdivision of sections for private parties, even if the expense is borne by the county or municipal authorities or by individuals.

§9185.3-2 Showing required.

(a) Necessity. The applicants for the resurvey of any township are required to present satisfactory prima facie evidence of the necessity for such action, based either upon general obliteration of evidences of the original survey or upon conditions so grossly defective as to preclude the possibility of a reasonably certain identification of the subdivisions of the subsisting survey or a satisfactory local restoration thereof.

(b) Condition of original survey. Applications for the resurvey of each township must be supported by evidence in the form of a statement, preferably from the county or other competent surveyor, showing in detail that the evidences of the original survey have been obliterated to such an extent as to make it impracticable to apply the suggestions of the circular issued by the Bureau of Land Management for the necessary restoration of the lines and corners in the proper identification of the legal subdivisions occupied by the present or prospective entrymen or that the obliteration of the original monuments has become so advanced that the land boundaries can be identified only through extensive retracements by experienced engineers of the Bureau of Land Management.

§9185.3-3 Majority of land owners.

A majority of the settlers in each township are required to join in the application, and, in addition, there must appear the endorsements of the entrymen and owners, including the State, whose holdings represent the



major part of the area entered or patented, with a description opposite each name of the lands actually occupied, entered, or owned, and a statement as to whether the applicant is a settler, entryman, or owner thereof. Where an entryman or owner, including the State, has failed for any reason whatsoever to join in the application, evidence of service of notice upon him for at least 30 days in advance of the filing of the application is required in order that he may be afforded ample opportunity to make timely protest against the granting of such resurvey if in his opinion such action is undesirable.

**§9185.4 Requirements for resurvey; with cost prorated.**

**§9185.4-1 Estimate of cost.**

(a) The cost of resurvey procedure is as a rule considerably in excess of that incident to the execution of original surveys and may range between rather wide limits. Where the obliteration is not excessive and the evidences of the original survey are harmoniously related, extensive verifying retracements will be unnecessary and ordinary dependent methods of resurvey can usually be applied. If, however, the obliteration is general or total, many miles of preliminary retracement may be required in order to obtain technical control, and where, by reason of errors in the original survey, the existing evidences thereof are discordant and conflicting locations have resulted, the procedure required may, in the case of densely entered townships, involve an expense of \$5,000 or more per township.



(b) The applicants for resurvey should understand, therefore, that although the estimate supplied will be as nearly correct as the available information will permit, its accuracy cannot be guaranteed, and, consequently, all such estimates are subject to revision, if necessary, as the work proceeds and the field conditions are more fully developed. Any deposit in excess of actual cost will be returned to the applicants as provided by law, but in cases where the cost exceeds the deposit made in accordance with the estimate, an additional deposit will be required, failing which, operations will be suspended.

(c) In the application of the terms of this act it is not intended that there shall be undertaken any work involving the mere re-establishment of lost or obliterated or misplaced corners in a limited area of a township, such work being within the province of the local surveyor, and the authority of the State Director will be restricted to the giving of advice in accordance with the circular for the restoration of lost or obliterated corners. Employees of the Government are prohibited from participating in the resurvey of a township or the reestablishment of lost corners or in the subdivision of sections for private parties, even if the expense is borne by the county or State authorities or by individuals, except as such action is specifically authorized by the Director, Bureau of Land Management, in accordance with the provisions of existing statutes.

(d) Deposit required: The deposit required of the petitioners by law must accompany the application and must be made in the amount, at the place and in the manner prescribed by the instructions which will accompany the estimate.

§9185.4-2 Showing required.

(a) Necessity. The applicants for the resurvey of any township are required to present satisfactory prima facie evidence of the necessity for such action. In general, it must be shown that the evidences of the original survey are so widely obliterated or that the prevailing survey conditions are so grossly defective as to preclude the satisfactory identification of the subdivisions of the subsisting survey or that the evidences of the original survey are in such an advanced state of deterioration that action looking to their preservation and perpetuation is expedient as in the public interest.

(b) Ownership of land. The applicants for resurvey are required to preface their petition by the statement that the extent of privately owned lands within the township is in excess of 50 percent of the total area thereof. If necessary, information in this connection may be obtained by the petitioners from the manager of the land office having local jurisdiction. Failure to comply with the condition set forth in this section or material error in the showing made, will not only result in delaying action upon the petition, but may require its rejection if it is found that the township is not properly subject to resurvey under the terms of the governing act.

§9185.4-3 Three-fourths of land owners.

The owners of three-fourths of the privately owned lands within the township are required to join in the application, and all petitioners in whom ownership is vested, either individuals, the State, or corporations such as



railroad companies whose interests are involved, are further required to supply, following their respective signatures, an accurate description by legal subdivision, section, township, and range of the lands to which title is claimed. Moreover, it must appear that notice of the proposed resurvey has been served upon all owners who have for any reason failed to join in the petition, and, in addition, it is highly desirable that all record entrymen who, under the terms of the act are not required to become parties to the petition, be similarly informed to the end that their objections, if any, may be heard and subsequent protest based upon the plea of ignorance may, insofar as possible, be avoided.

#### PART 9230--TRESPASS

##### Subpart 9239--Kinds of Trespass

##### §9239.0-8 Measure of damage.

The rule of damages to be applied in cases of timber, coal, oil, and other trespass in accordance with the decision of the Supreme Court of the United States in the case of *Mason et al. v. United States* (260 U.S. 545, 67 L. ed. 396), will be the measure of damages prescribed by the laws of the State in which the trespass is committed, unless by Federal law a different rule is prescribed or authorized.



Ore. R.S. sec. 209.020:

Surveys on court order. The county surveyor shall execute all orders directed to him by any court of record or county court for surveying roads, or surveying or resurveying any tract of land the title to which is in dispute before such court, and all orders of survey for the partition of real estate.

Ore. R.S. sec. 209.070:

Duties in respect to surveys. \* \* \*

\* \* \* \* \*

(6) Make all surveys of legal subdivisions in conformity with the laws and regulations of the General Land Office of the United States.

Ore. R.S. sec. 209.200:

Resurvey of government-surveyed lands.  
In the resurvey of lands surveyed under the authority of the United States, the county surveyor shall observe the following rules:

(1) Section and quarter-section corners, and all other corners established by the government survey, must stand as the true corners.

(2) They must be re-established at the identical spot where the original corner was located by the government survey, when this can be determined.

(3) When this cannot be done, then such corners must be re-established according to the government field notes, adopting proportionate measurements where the present measurements differ from those given in the field notes.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Nos. 20905-20906

UNITED STATES OF AMERICA,

Appellant and Cross-Appellee

v.

JOHN HUDSPETH, ET AL.,

Appellees and Cross-Appellants

ADDENDUM TO THE BRIEF FOR THE UNITED STATES

In accordance with Rule 18(f) the following is a  
list of record references to the exhibits:

<u>Exhibit</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
United States' Exhibits			
1-4	11	11	11
5	--	34	35
6-8*	--	11	11
23-	--	92	92
23-A	97	--	--
24	--	92	92

\*/ These exhibits were reproduced and appear in a third  
volume of the record entitled "Exhibits."





<u>Exhibit</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
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Hudspeths' Exhibits

31	--	83	84
32	--	120	122
34	--	113	113
37	--	35	35



CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of the brief and this addendum, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief with addendum are in full compliance with those rules.

William M. Coren  
WILLIAM M. COREN

Attorney, Department of Justice,  
Washington, D. C. 20530.





### CERTIFICATE OF SERVICE

The brief in this case, as well as this addendum, has been served upon the following opposing counsel: Donald W. McEwen, Esquire, Cole, Jauraguy, Hardy, Butler and McEwen, 1408 Standard Plaza, 1100 S.W. Sixth Avenue, Portland, Oregon 97204; and James P. Bodie, Esquire, Bodie and Minturn, 203 North Main Street, Prineville, Oregon 97754, by placing same in the United States mail, properly addressed, postage prepaid. In each manner the brief was served on September 7, 1966, and the addendum was served on this 23rd day of September, 1966.

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WILLIAM M. COHEN

Attorney, Department of Justice,  
Washington, D. C. 20530.

